

Planning Law: *Ian Tysh* (planning law expert)

I can only cover major topics in outline so don't rely on this as definitive in relation to any planning issue. There are rules and exceptions and there will be other exceptions, too.

The English Legal Framework

Here it is important to distinguish between local plans and control of separate proposals

- 1919 – first compulsory local development plans
- 1947 – first control of development proposals
- Part 2 of the Planning & Compulsory Purchase Act 2004 – principal local plan legislation
- Town & Country Planning Act 1990 – principal development proposal legislation
- Conservation of Habitats & Species Regulations 2017 and Town & Country Planning (Environmental Impact Assessment) Regulations 2017: principal legislation requiring consideration of environmental issues as part of the planning process

The substantive parts of the Regs were not altered as a result of Brexit.

- Community Infrastructure Levy introduced by the Planning Act 2008; makes many developments liable to pay a contribution towards the cost of new infrastructure. Replaced planning contributions. Still only 20% or so of increase in value secured by the state/community cf 80% in Netherlands and France
- self-build provision 2015
- neighbourhood plans 2017

Development proposals

- 1990 Act, section 57(1): “*Planning permission is required for the carrying out of any development of land*”
- Section 55(1), 1990 Act: development is one or both of (a) carrying out building, engineering, mining or other operations in, on, over or under land and (b) making any material change in the use of any building or other land

But definition this does not include eg wholly internal works unless more underground space is going to be provided or the external appearance of the building will be materially affected.

- Many developments are permitted by legislation although some require prior approval and/or approval of specific aspects eg height or materials used. This was greatly expanded last year, allegedly to assist the economic recovery, eg by turning shops and offices into residential dwellings. It has resulted in many unacceptable homes eg without windows, badly heated/insulated and tiny.
- Developments not permitted by legislation must go through the planning process

The planning process-applications

1. Prescribed form, which must be accompanied by the required documents

2. The authority can refuse to consider an application if within the previous 2 years
 - (a) 2 **substantially similar** applications have been refused without an appeal being lodged or
 - (b) a planning inspector has refused an appeal about a **substantially similar** application

Re (a): it doesn't matter who's made the 2 applications, ie it can't pass to eg spouse after 2 rejections who then tries again within the 2-year period

3. If the application is properly made, the authority must acknowledge it in writing

There are time limits for making a decision:

- 16 weeks from receipt if an Environmental Impact Assessment is required
- 13 weeks for major applications
- 8 weeks for all others

1. The limits can be extended by agreement between the authority and the applicant
 - a) If the limit is reached without a decision being made or an extension being agreed, the applicant can appeal. The **appeal time limit is 6 months** from the date of the decision time limit
 - b) The application has to be **publicised** and specific bodies and individuals **notified** of it. All applications and supporting documents have to be made available on the authority's website

The planning process-decisions

The starting point for every decision is section 38(6) of the Planning & Compulsory Purchase Act 2004: *If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise*

This boils down to 3 points:

- (1) is the plan relevant to the decision? Enforcement, for example, isn't in a local plan;
- (2) if so, make the decision in accordance with the plan unless
- (3) material considerations point the other way.

NB: it is wrong and misleading to say that Wealden does not have a local plan. It does – it consists of some of the policies in the 1998 plan and all those in the 2013 one, called the Core Local Strategy for some reason. It doesn't have an up-to-date plan and that has consequences, but much less serious ones than having no plan at all

- A **material consideration** is something the decision-maker reasonably considers to be relevant

It can include social, economic & environmental considerations eg R(Copeland) v Tower Hamlets BC [2010]: it is legal to take presence of a school near to proposed new fast-food outlet into account as reason to refuse.

It must relate to the character or use of land and to the particular proposal.

- The **National Planning Policy Framework (NPPF)** is a material consideration, but by no means the only one

Material considerations (MC) can support the plan, eg the government's 2050 net-zero- carbon legally binding target, the Paris agreement, the council's own AECOM report – Wealden Green Party says as well as in some respects contradict the plan eg parts of the NPPF.

Wealden presents issue as plan v NPPF with nothing else relevant, but we say *that is entirely wrong and illegal*; eg if no policy base to ban oil and gas in plan (disputed), MCs could require they be banned.

NPPF para 11(d):

Plans and decisions should apply a presumption in favour of sustainable development.

For **decision-taking** this means:

a) approving development proposals that accord with an up-to-date development plan without delay; or
 b) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

- i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; **or**
- ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

- An **Environmental Impact Assessment (EIA)** is required for the largest and/or potentially most damaging developments
- The assessment is a process required to reach a decision on whether the development should go ahead
- It assesses the development's characteristics, the environmental sensitivity of its location and its potential impact

This is mandatory for eg gas, oil, power stations, asbestos removal, chemicals; and re-housing for development of >150 dwellings/5 hectares, unless mostly or partly in a sensitive area; then individual decision has to be based on the significant effects in Sch 3, in 3 categories: characteristics of the development, environmental sensitivity of the location and characteristics of the potential impact.

An EIA cannot be avoided by considering the mitigation of HRA (Habitat Regulations Assessment).

A **Habitat Regulations Assessment** has to be considered for every development which is likely to have a significant effect on a Special Area of Conservation (SAC) or Special Protection Area (SPA), such as Ashdown Forest and the Pevensy Levels or Areas of Outstanding Natural Beauty (AONB)

- Permission must be refused if the assessment is that the development will adversely affect the protected area unless there are imperative reasons of overriding public interest for giving permission.

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There are big problems with WDC's approach:

- failed plan – air pollution effect on SAC – now given up
- SANGS [Suitable Areas of Natural Green Space] and SAMMS [Strategic Access Management & Monitoring Strategy] re SPA – there is no evidence to support their position. Keep saying they have evidence but unable to tell us what it is, only that others, eg Natural England agree there is evidence.

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Who in WDC makes final decision?

- Roughly 95% of decisions are made by planning officers **under delegated powers**
- The rest are made by the two planning committees, PCN and PCS.